Supreme Court, U. S.
FILED
NOV 19 1973
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY a Division of KNIGHT NEWSPAPERS, INC.,

Petitioner,

vs.

PAT L. TORNILLO, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR NEW YORK NEWS INC. AS *AMICUS CURIAE*

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BRIEF OF NEW YORK NEWS INC. AS AMICUS CURIAE

The New York News Inc. ("The News") owner and publisher of the nation's largest mass circulation newspapers, The New York Daily and Sunday News, with the consent of the parties pursuant to Rule 42 of this Court, respectfully submits this brief in support of petitioner Miami Herald's petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

This action involves the constitutionality of a Florida Statute Section 104.38 Fla. Stat. ("Section 104.38") which provides:

> F.S. Section 104.38 — Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may

> make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in Section 775.082 or Section 775.083.

Petitioner's brief to the Florida Supreme Court presented a thorough exposition of the facts and well reasoned arguments with supporting authorities. The News will not here repeat petitioner's presentation but will summarize the propositions that should be controlling.

1. Where First Amendment freedoms are at stake the requirements of statutory definiteness must be strictly enforced so that no improper applications of the statute may be made which deter the press from the free exercise of First Amendment rights: *Ashton v. Kentucky*, 384 U.S. 195 (1966); *NAACP v. Button*, 371 U.S. 415 (1963). With reference to this proposition and to Section 104.38, Florida County Court Judge J. Robert Durdon stated:

> "In the opinion of this Court, it takes little imagination to foresee the susceptibility of 'sweeping and improper application' of the statute in question" *State of Florida v. News-Journal Corp.*, (County Judge's Court for Volusia County, 1972).

2. Section 104.38 is unconstitutionally vague so as to be violative of the Due Process clause of the Fourteenth Amendment of the United States Constitution. An editor of a newspaper, cognizant of the criminal sanctions of Section 104.38, will frequently be faced with a distressing and burdensome dilemma that should not be imposed on the press.

3. The leading First Amendment scholar, Z. Chafee succinctly states the case:

> "[L]iberty of the press is in peril as soon as the government tries to compel what is to get into a

newspaper" II Z. Chafee, Government and Mass Communications, 633 (1947).

Compelling a newspaper to publish articles and opinions contrary to its own views and against its own will is governmental censorship of the most direct kind. As was recently said by Judge Wright of the 9th Circuit, "There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material." *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971).

4. There is no First Amendment Right of an individual to commandeer privately owned presses to espouse his own views. Chief Justice Burger aptly stated this proposition in the recent decision in *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 124 (1973):

> "Nor can we accept the Court of Appeals view that every potential speaker is . . . the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material."

The State must not be allowed to become the press' super-editor.

5. The courts have traditionally held that newspaper publishing constitutes free enterprise, free of state action or color of state involvement. Eg., *Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970) and cases cited therein.

6. Contrary to respondent's argument, Section 104.38 will not achieve a wider dissemination of political opinions in the press. It is indeed far more likely to have the opposite effect, that is, to have a "chilling effect" on public discussion that will discourage a publisher from expressing political opinion or publishing news accounts,

to which the statute may be claimed to be applicable. Under Section 104.38 a publisher will be faced with the unenviable options of involuntarily turning his paper's columns over to any politician running for a local, state, or national office who may claim that he had been "attacked" by the publications or, alternatively, the publisher will be subject to criminal penalties. The third and a likely, option that may be exercised, is that publishers will seek to avoid political controversy and will self-censor the newspaper so as to avoid claims under the statute. Section 104.38 can only serve to deter the press from voicing criticism of public officials and to undermine the press' role in the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Self-censorship compelled by the State cannot be allowed to suppress speech the State could not suppress directly. *Smith v. California*, 361 U.S. 147 (1959).

7. Section 104.38 is unconstitutional both as a direct restraint on the freedom of the press, and for the "chilling effect" it will have on the press' exercise of that freedom.

8. The press throughout this country were gravely concerned by the Florida Supreme Court's upholding the constitutionality of Section 104.38. After the Florida Supreme Court announced its decision, the "New York Daily News" editorialized in its July 20, 1973 issue:

> "Carried to its logical conclusion, the verdict would expose newspapers to endless harassment by politicians and just about everyone else who differed with them on any issue."

9. Clayton Kilpatrick, editor of the "Chicago Tribune" is quoted in the July 28, 1973, issue of "Editor & Publisher" at page 9:

> "Anytime a newspaper is forced to publish an order, there is the risk that people who are pushing the buttons will control the product."

Reasons for Granting the Writ

10. Similarly, the "New York Times" in its July 22, 1973 issue termed the Florida decision "shocking" and, with particular reference to the vagueness of the statute, asked:

> "Would an incumbent governor or legislator or President be free to demand that he be allowed to answer every critical editorial comment on his acts and policies in office? Would every rebuttal by a newspaper then entitle the official to a counter rebuttal? Could the editor be legally challenged if he declined to print the reply in full, no matter how much of it might be irrelevant campaign harangue — and would the editor be told by the court how prominently the reply had to be printed in order to insure equality?"

11. The press considers the issue to be resolved in this case to be of historic significance, not only in its own interest but in the interest of the public. Section 104.38 may serve as a prototype for similar legislation in other states. Unless this Court declares the statute unconstitutional other legislatures, under the mistaken belief that they are promoting the causes of free public debate and discussion in the press, will in fact vitiate this nations' press' traditional and robust ability to do so.

WHEREFORE, The News prays this Court grant *certiorari* in this case and find Section 104.38 Fla. Stat. unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

JAMES W. RODGERS
Attorney for Amicus Curiae
New York News Inc.

New York, New York
November 12, 1973